IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 553 of 2001

with

CRIMINAL APPEAL No 614 of 2001

with

CRIMINAL APPEAL No 714 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MUNAWAR IQBAL HUSSAIN KAGDI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 553 of 2001
   MR AB VYAS for Petitioner No. 1
   PUBLIC PROSECUTOR for Respondent No. 1
2. Criminal Appeal No. 614 of 2001
   MR MH BAREJIA for Petitioner No. 1
   PUBLIC PROSECUTOR for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 17/09/2003

ORAL JUDGEMENT

These three appeals have been filed by four accused persons who were convicted by the learned Addl. Sessions Judge, City Sessions Court at Ahmedabad by judgment and conviction order dated 22/05/01 passed in Sessions Case No.283/2000 for offences punishable u/s.395 IPC and 135(1) of the Bombay Police Act. Each of them has been sentenced to suffer R.I. for six months for an offence punishable u/s.395 IPC and were required to pay fine of Rs.3,000/-. In default of payment of fine, each appellant has been directed by the said Court to suffer S.I. for six months. For an offence punishable u/s.135(1) of the Bombay Police Act each appellant has been sentenced to suffer S.I. for one month and has been directed to pay fine of Rs.5,000/-. In default of payment of fine, each of them has been directed to suffer further S.I. for one month.

2. The facts of the prosecution before the trial court against the appellants may be briefly stated as follows;

2.1 On 03/01/2000, the complainant who was in a courier service employment was on his way to hand over the parcels etc. including valuable articles at its main office, situated at Vikram Chambers, along with two other companions, who were also employed by the said Courier Service. At about 8.20 pm, after completing the work at Vikram Chambers, they all hired an auto rickshaw and started to go by the said rickshaw. When they passed Nehru Bridge, at the other end of the said Bridge near Roopali Cinema, an unknown person stopped the rickshaw by showing signal. The complainant and his companions told the rickshaw driver not to stop the vehicle. However, the rickshaw was forcibly stopped and some persons forcibly entered in the said rickshaw and directed that the rickshaw be taken to a particular direction. Then the rickshaw was stopped on way to Khanpur area near Cama Hotel. As soon as the rickshaw was stopped, the persons who had forcibly entered the said rickshaw, snatched away the white bag from the complainant

and all of them ran away from the spot. Thereafter, the complainant filed first information report which was investigated.

2.2 During the course of investigation, seven accused persons were arrested. The investigating police officer had arranged for the test identification parade and at the conclusion of investigation, chargesheet was filed against the appellants and other accused persons. Thereafter, the case was committed to the Court of Sessions, as the offences were triable exclusively by the Court of Sessions. In the Sessions Court, police investigation papers were supplied to the appellants and other accused persons. Charge was prepared and framed. It was read over and explained to the appellants and other accused persons. They all pleaded not guilty and therefore, evidence was recorded. At the conclusion of evidence, the learned Addl. Sessions Judge recorded further statements of the appellants u/s.313 of the Code of Criminal Procedure, 1973 (for short, "the Code"). Arguments were heard and thereafter, the learned Judge found the appellants guilty for the aforesaid offences. She, accordingly, convicted the appellants for the said offences and after hearing them on the quantum of punishment, inflicted the aforesaid punishment on the appellants.

3. Feeling aggrieved by the said judgment and conviction order of the trial court, the appellants have preferred these appeals before this Court. It has been contended by the appellants before this Court that though the evidence was quiet insufficient, still the appellants have been convicted and therefore, the conviction is illegal. It is, further, contended that the case mainly rested on the test identification parade. It has been brought on record that the evidence about the said parade was not satisfactory; that, even otherwise there was no material connecting the appellants with crime and therefore, the trial court has committed illegality by convicting the appellants. That, therefore, the conviction order is illegal and hence, it may be set aside.

4. The appeals were admitted and Mr.S S Patel learned APP has appeared on behalf of the State in all the three matters. I have heard the learned advocates for the appellants and learned APP for the State.

Incidentally, they have taken me trough the evidence of the witnesses contained in the paper book.

5. The learned advocate for the appellants has heavily relied upon the evidence of the test identification parade. On the other hand, the learned APP has argued that the test identification parade was properly conducted and even if there was some error in investigation, it would not vitiate the trial. It appears that in order to prove the offence against the appellants, the prosecution has examined as many as twenty witnesses whose names appear in para 1 of the judgment at page 839. It appears that, in all, the prosecution has produced nearly 21 documents, as has been noticed from page 841 onwards of the judgment.

6. So far the evidence on record is concerned, we find that the prosecution has examined the complainant, who had filed the FIR before the trial court. PW-2, Dharmendrabhai Narendrabhai Patel, Ex.26, the complainant has clearly stated that he and his companions were on their way to Nehru Bridge in a rickshaw for delivering the courier service materials. He further stated that as soon as they crossed Nehru Bridge, one person stopped the rickshaw and though the informant directed the rickshaw driver not to stop the vehicle, the said person and others forcibly entered in the rickshaw and directed the driver to take the rickshaw towards Khanpur area, where the rickshaw was stopped and the bag from the hand of the informant, was snatched away by one of the appellants. This witness has been cross-examined at length. It appears that during the course of cross-examination, no fruitful material was derived. With respect to the evidence of this witness, the learned advocate for the appellants has argued that the appellants were shown to the witnesses and therefore, the test identification parade is of no consequence. For this purpose, he has drawn my attention to the evidence of this witness, wherein he has stated that accused no.7 was seen by him after his arrest and he was able to identify him. Now, this fact shows that before going to the test identification parade, the informant had seen accused no.7 in the police station.

7. It appears that if and when some doubtful persons or suspected persons were arrested, the complainant was invited to identify the persons, if they were the accused persons. In the process, the informant appears to have been called at the police station and there the informant appears to have identified accused no.7. It, therefore, cannot be said that accused no.7 was shown to the

informant in advance. On the contrary, it appears from the evidence of the informant that the informant himself had identified accused no.7, as one of the persons who had committed the offence of dacoity at the relevant point of time.

8. The learned advocate for the appellants has argued that as per the evidence of the investigating police officer at page 327, the photographs of accused persons were being shown to the complainant and the witnesses, in cases of the offences relating to dacoity and robbery and even the accused persons were also being shown to such witnesses. This is a general statement and it has not been specifically put to the witnesses, as to whether in the present case also, the appellants were shown to the witnesses before the test identification parade. Therefore, it cannot be said that before holding the test identification parade, the appellants were shown to the complainant and other witnesses.

9. It has also been argued that as per the evidence of the investigating officer at page 329, the photographs of accused persons were placed along with the chargesheet. Chargesheet was be filed only after investigation was over. Therefore, these photographs were not shown to the witnesses, before conducting the test identification parade. Therefore, the test identification parade will not stand vitiated, on account of this fact.

10. It has also been shown from the evidence of the investigating officer that the investigating police officer used to supply police investigation papers along with photographs of the accused persons to the informant. The police officer has stated that it is not true that chargesheet papers along with photographs were provided to the informant. However, it has not come in evidence of the informant that the photographs were provided to him and that the copies of chargesheet papers were provided to him by the investigating police officer. On the other hand, it has not come during the course of evidence of the investigating police officer that he had actually supplied the photographs with chargesheet papers to the informant in advance. Therefore, this evidence will not lead us to accept that the photographs were provided to the informant, in order to enable him to identify the accused persons in the Court.

11. On the other hand, the test identification parade has been properly conducted and detailed evidence has been given by the Executive Magistrate, showing as to how

the test identification parade was carried out by him.

12. It has been contended that there was some delay between the date of arrest of the appellants and the date of test identification parade. The prosecution has explained the delay during the course of evidence of the investigating officer. However, the material part is that it has not come on record that the appellants were shown to the witnesses including the complainant before the test identification parade. Once it is found that the witnesses, including the informant, had no opportunity to see the appellants after there arrest and before the test identification parade, then in that event, delay in conducting the test identification parade will not vitiate the said parade. It is more so when the delay has been explained by the police investigating officer.

13. On this aspect we can refer to a decision in the case of Ramanand Ramnath V/s. State of Madhya Pradesh reported in 1996(2) Crimes 57(SC) wherein it has been observed that delay in conducting the test identification parade would not vitiate the parade. In the above referred case, the appellant was arrested on 29/08/81 and the test identification parade was held on 14/09/81. The Hon'ble the Supreme Court was pleased to observe that it could not be said that there was unusual delay in holding the test identification parade.

13.1 In the present case, we find that on the one hand the prosecution has explained the said delay and on the other, it is not on record that the identifying witnesses had an occasion or opportunity to see the appellants, after there arrest and before the test identification parade. When this is not the case, then the delay in holding the test identification parade would not stand vitiated, simply because there was a delay in holding the parade.

14. It has also been contended that the witnesses had seen the appellants after their arrest and before the test identification parade. The complainant has categorically deposed before the trial court that he had not seen the appellants after their arrest and before the test identification parade, except accused no.7, with respect to which reference has been made hereinabove. Once the witness has positively stated that the appellants were not shown to him before the test identification parade and when there is no further material on record to show that the appellants were shown

to the informant or other witnesses, then in that case, there is no reason to accept the defence of the appellants, that the appellants were shown to the prosecution witnesses, before conducting the test identification parade.

15. Even on the date of the test identification parade, the evidence on record clearly shows, the appellants were invited first and were kept in a separate room. The witnesses who were invited to identify the accused persons were called about 15 minutes thereafter and were required to sit in a different room. This further shows that necessary precaution was taken by the learned Executive Magistrate, before conducting the test identification parade.

16. The learned advocate for the appellants has also argued that the faces of the appellants were not covered, when they were brought to the office of the Executive Magistrate. At the same time, it is also required to be considered that there was some time gap between the entry of the appellants and the entry of the witnesses. In that view of the matter, when the identifying witnesses had no opportunity to see the appellants before the test identification parade, then in that event, mere fact that the faces of the appellants were not covered, would not vitiate the identification parade. Therefore, the evidence of identification parade cannot be brushed aside on this consideration.

17. Then, it has also come on record that the learned Executive Magistrate had taken other precautions for holding the test identification parade. When five persons were required to be identified, twenty five persons were invited and the appellants were given an opportunity to change their clothes and to change their position in the queue. The appellants appear to have exercised their option in fovour of changing their place in the queue and despite the fact that they had changed there position, the identifying witnesses were able to identify the appellants.

18. It is true that it has come on record that the informant had identified the appellants by pulling them out of the queue and by their names. At the same time, it is also required to be considered that when the appellants were pulled out of the queue by the identifying witnesses, the requirement of test identification parade stands satisfied. At the same time, when it has come on record that the witnesses had named the accused persons/appellants, then in that event,

it can be said that after the appellants were pulled out of the queue, the names may have been ascertained by the learned Executive Magistrate and therefore, the witnesses may have named them. The evidence on record has been appreciated extensively by the trial court. This Court is in general agreement with the reasonings and findings recorded by the trial court and with respect to the appreciation of evidence of witnesses and that of the documents on record. Once this Court finds itself to be in general agreement with the reasonings and findings of the trial court, it would not be necessary to go into detailed discussion of the evidence on record. In fact, the points raised by the learned advocate for the appellants have been discussed at length. Therefore, it is found that the evidence has been properly appreciated by the trial court and there is no reason to defer from the view taken by the trial court with respect to the appreciation of evidence on record.

19. It is required to be considered that in the case of Harbhajan Singh V/s. State of J.& K. reported in AIR 1975 SC 1814, it has been observed that absence of test identification parade is not necessarily fatal in all cases. In the present case, we find that the test identification parade has been held and it has been properly conducted without any infirmity. However, even if we find that there is some technicality here or there, then it would not vitiate the parade and consequently, it would not vitiate the conviction recorded by the trial court.

20. Even in the case of State of Maharashtra V/s. Suresh reported in 2000(1) SCC 471, the Hon'ble the Supreme Court has referred to the principle of test identification parade and has also observed that the modus operandi adopted by the Executive Magistrate in conducting the parade was reasonably full proof.

21. It is required to be considered that the test identification parade is a corroborative piece of evidence, to substantiate the substantive evidence on record. The evidence of test identification parade is therefore required to be appreciated on broad basis with the above background in mind.

22. In above view of the matter, it is very clear that the witnesses were able to identify the present appellants, in presence of the Executive Magistrate, at the test identification parade. Looking to the over all evidence on record, the trial court cannot be said to have committed error in convicting the appellants for an

offence punishable u/s.395 IPC. In above view of the matter, there is no substance or merit in these three appeals and therefore, they are required to be dismissed, since no other point was advanced during the course of arguments.

23. The learned advocate for the appellants has relied upon a decision of the Hon'ble the Apex Court in the case of Kusho Mahton V/s. The State of Bihar reported in AIR 1980 SC 788 wherein the Hon'ble the Supreme Court had confirmed the conviction, but reduced the quantum of punishment to imprisonment already undergone. The facts were different there. No attempt was made to cause injury to any of the inmates of the house or other persons, at the time of committing the offence or even thereafter. In the case on hand, the appellants were armed with knives and the offence was committed in respect of properties worth Rs.32,50,000 (approx.) and was committed at early night hours and that too in a thickly populated area with full traffic around. This shows the modus operandi of the appellants in committing the offence in question and therefore, this is not a proper case for reducing the quantum of punishment.

24. The learned advoate for the appellants has also relied upon a decision in the case of Pooran Singh V/s. State of U.P. reported in AIR 1981 SC 1638. There it was observed by the Hon'ble the Supreme Court that at the time of occurence of the event, the appellant was a raw youth of 19 years and therefore, while maintaining the conviction, the quantum of punishment was reduced to imprisonment already undergone.

25. He has also relied upon a decision in the case of Shivappa & Ors. V/s. The State of Mysore reported in AIR 1971 SC 196 wherein the appellants were convicted for an offence punishable u/s.395 of IPC. The Hon'ble the Supreme Court observed that though the offence is serious, no injury was caused and therefore, sentence of 3 years R.I. would meet the ends of justice. I have carefully considered the decisions as aforesaid, cited by the learned advocates for the appellants. However, having regard to the facts and circumstances of the case and considering the nature of offence and the manner in which it has been committed and considering the fact that the offence was committed at early night hours in an area where the traffic is always full, it can be said that the appellants must have made out a design in advance, for committing the offence and therefore, it is not proper to exercise discretion of reducing the quantum of punishment in favour of the appellants. Therefore, also these are

not the fit cases for reducing the quantum of punishment, else, it would encourage the other accused persons to commit similar offences in similar fashion.

26. At this stage, the learned advocate for the appellants in all the three appeals have submitted that the appellants are aged around 17 to 18 years, except one of them, who is aged about 26 years and therefore, looking to the young age of the appellants and considering the fact that they do not have any past bad records, it would be appropriate to reduce the sentence. It is also contended that the appellants have been directed to suffer R.I. for six years and they have already undergone sentence of nearly four years and considering the remittance, there would be hardly eights months left to be undergone by them. That, therefore, looking to the above position, the jail sentence already undergone may be treated to be adequate and sufficient and therefore, the jail sentence may be accordingly and appropriately reduced.

27. The learned APP has strongly objected to this submission mainly arguing that mere young age cannot be treated to be sufficient for reducing punishment. It is required to be considered that though the three appellants are around 18 years of age and though the fourth appellant is about 26 years of age, the offence committed by them is of a serious nature. The offence was committed in a thickly populated area. The informant and other companions, who were travelling in a rickshaw, were stopped on a public road and then, were taken to another area. The bag carried by the informant was snatched away which contained jewellery, diamonds and other valuable materials worth Rs.32,50,000/- (approx.). This shows that the appellants had a good plan in advance. They must have information that the informant and other witnesses were carrying valuables with them. Therefore, the vehicle was stopped and was then taken to a little lonely place. The modus operandi adopted and demonstrated by them clearly shows that there was a well arranged pre plan for committing dacoity at early night hours on a thickly populated road.

28. In that view of the matter, looking to the manner in which the offence has been committed and looking to the nature of offence committed by the appellants, I am of the view that mere fact that the appellants are of young age and merely because there is no past antecedent, it is not a fit case for showing leniency. On the other hand, it is required to be considered that these aspects were placed for consideration before the learned Addl.

City Sessions Judge who tried the case in question. It seems that though the maximum punishment is imprisonment for life or imprisonment upto 10 years, the learned Judge has awarded R.I. for 6 years. This shows that the learned Judge had considered the aforesaid factors before inflicting the aforesaid punishment. In fact, looking to the nature of offence and considering the manner in which it has been committed, it may be stated that the sentence is on the lenient side. Therefore, no further leniency is required to be shown by this Court. Even the learned Addl. Sessions Judge has taken into consideration that the offences of this nature on a public road have increased and therefore, with a view to bring some check on such offences, it is necessary to become a little harsh towards such accused persons. Anyway, the punishment awarded cannot be said to be too harsh. Therefore, no interference is required even on the point of quantum of punishment.

29. For the foregoing reasons, these three appeals are required to be dismissed and they are accordingly dismissed and the judgment and conviction order are confirmed.

(D. P. Buch, J.)

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